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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

WILLIAM H. KILLOREN, Trustee in Bankruptcy of Hamilton-Brown Shoe Company, a Corporation, Bankrupt, Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, Respondent.

No. 739

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit

and

BRIEF IN SUPPORT THEREOF.

LON O. HOCKER,
HARRY S. GLEICK,
Counsel for Petitioner.

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No. .....,

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of William H. Killoren, Trustee in Bankruptcy of Hamilton-Brown Shoe Company, a corporation, Bankrupt, respectfully shows to this Honorable Court:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

On June 18, 1937, the National Labor Relations Board issued a complaint against the Hamilton-Brown Shoe Company alleging that the Shoe Company was engaged in unfair labor practices (R. p. 19). The trial examiner con-

ducted a hearing and made his report, and in due course a hearing was had before the National Labor Relations Board. On November 23, 1938, the Board rendered a decision finding the Shoe Company guilty and ordering a number of employees, named in the Board's order, reinstated with back pay (R. 19). On a petition for review, the United States Circuit Court of Appeals for the Eighth Circuit affirmed the Board's order and directed its enforcement [104 F. (2d) 49]. This decision was filed May 29, 1939 (R. 34).

In the meantime, however, on April 17, 1939, the Hamilton-Brown Shoe Company filed its petition for corporate reorganization under the provisions of Chapter X of the Bankruptcy Act (R. 107). The attempt to reorganize was unsuccessful, and on June 22, 1939, the Shoe Company was adjudicated a bankrupt by the United States District Court in St. Louis (R. 107).

On October 6, 1939, the National Labor Relations Board filed with the referee in its own name proof of claim alleging that the bankrupt was indebted to it "in upwards of the sum of $161,160.17" as the amount due 168 employees covered by the Board's order of reinstatement with back pay; the claim set out the name of each employee and the amount to which he was entitled (R. 4). The Board in its claim asserted that the back pay allowance constituted a provable debt or claim in bankruptcy, that the Board had the right to assert such claim, and that the claim should be given the priority due to United States under Section 64a (5) of the Bankruptcy Act, 11 U. S. C. A., Section 104a (5).

William H. Killoren, petitioner herein, as trustee in the bankruptcy proceedings, in due course filed a motion to expunge the Board's claim and subsequently an amended motion to expunge (R. 55). After a hearing, the referee

entered an order sustaining the trustee's motion and ordering the claim expunged (R. 117, 119).

A petition for review of this order was duly filed (R. 120). On August 3, 1940, the petition for review was denied by the District Court (R. 130).

The Circuit Court of Appeals for the Eighth Circuit, on an appeal taken to that Court, reversed the order of the District Court (R. 161), directed that the claim be allowed, and that the claims of the individual employees be given priority under Section 64a (2) of the Bankruptcy Act, 11 U. S. C. A., Section 104a (2). The opinion held that the unpaid awards were constructively wages earned. The contention of the Board that the claim be given the priority due the United States under Section 64a (5) of the Bankruptcy Act, 11 U. S. C. A., Section 104a (5), was denied.

In due course both petitioner and the Board filed their respective motions for rehearing, which were denied by the Court on October 11, 1941 (R. 203).

BASIS OF THE JURISDICTION OF THIS COURT.

Jurisdiction is claimed under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (see Title 28, U. S. C. A., Section 347).

An interpretation is sought of the Bankruptcy Act (Act of July 1, 1898, c. 541, 30 Stat. 544), as amended, and in particular of the Amendatory Act of 1938, known as the Chandler Act (Act of June 22, 1938, c. 575, 52 Stat. 840); and of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449). Section 63a (4) of the Bankruptcy Act [Title 11, U. S. C. A. 103a (4)] provides that debts of a bankrupt may be proved and allowed if founded upon an open account or a contract, expressed or implied. Section 64a (2) of the Bankruptcy Act [Title 11, U. S. C.

A. 104a (2)] provides for priority to wages earned within three months before bankruptcy by workmen, not to exceed $600.00 to each claimant. Section 64a (5) of the Bankruptcy Act [11 U. S. C. A., Section 104a (5)] provides for priority to any person, including the United States, who by the laws of the United States is entitled to priority.

Section 10 (c) of the National Labor Relations Act [Title 29, U. S. C. A., Section 160 (c)] provides, inter alia, that if the Board is of the opinion that any person named in a complaint has engaged in or is engaging in any unfair labor practices, then the Board is authorized to issue a cease and desist order and "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."

The judgment of the Circuit Court of Appeals, Eighth Circuit, was entered September 6, 1941 (R. p. 172); the petitions for rehearing were denied October 11, 1941 (R. p. 203); thirty days stay of mandate was granted October 23, 1941 (R. p. 203).

THE QUESTION PRESENTED.

The questions presented are whether an order of the National Labor Relations Board of reinstatement with back pay is properly the basis of a claim allowable and provable under the Bankruptcy Act; and whether the National Labor Relations Board may properly file a claim based upon such an order; and whether such a claim, if allowable and provable, is entitled to any priority; and, if entitled to priority, whether it is to be accorded the priority given under Section 64a (2) of the Bankruptcy Act or the priority given under Section 64a (5) of that Act.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals has decided an important question of federal law which has not been, and should be, settled by this Court.

2. The Circuit Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this Court.

Whether or not an order of the National Labor Relations Board providing for reinstatement of employees with back pay is a provable claim is a question of considerable importance. The Board itself recognized that at the outset of these proceedings (R. 105). If the claim is provable in bankruptcy, it is dischargeable in bankruptcy, as we shall undertake to develop in further detail in the accompanying brief. If it should be held that the claim is provable and allowable under the Bankruptcy Act, it is important to determine what priority, if any, should be accorded the claim. The National Labor Relations Board contended the claim should be given the priority of the United States under Section 64a (5) of the Act, but petitioner contended that the claim was not entitled to any priority under the Act; while the decision of the Court of Appeals was to the effect that the claim was entitled to priority under Section 64a (2) of the Act.

PRAYER.

For the foregoing reasons your petitioner prays that a writ of certiorari issue out of this Court to the Circuit Court of Appeals for the Eighth Circuit, commanding said Court to certify and send to this Court, on a day to be determined, a full and complete transcript of the record

of all the proceedings of such Court had in this cause, to the end that this cause may be reviewed and determined by this Court; that the final order and decree of the Circuit Court of Appeals for the Eighth Circuit be reversed, and that the petitioner be granted such other and further relief as is proper.

WILLIAM H. KILLOREN,
Trustee in Bankruptcy of Hamilton-Brown Shoe Company, a Corporation, Bankrupt,
Petitioner,

By LON O. HOCKER,
HARRY S. GLEICK,
Counsel for Petitioner.

IN THE

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No. .....

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINIONS OF THE COURTS BELOW.

The District Court rendered no opinion; its order appears on Page 130 of the Record.

The opinion of the Circuit Court of Appeals reversing this order will be reported in 122 F. (2d) 609. (See Adv. Sheets October 27, 1941.) It was filed on September 3, 1941, and appears at Page 161 in the Record.

JURISDICTION.

Reference is made to the jurisdictional statement contained in the petition in this Court.

STATEMENT OF THE CASE.

Reference is made to the Summary Statement of the Matter Involved, contained in the petition.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals, Eighth Circuit, erred in finding and holding that the filing of a claim on behalf of the individual employees in the estate of a bankrupt employer would tend to effectuate the policies of the National Labor Relations Act. The Court overlooked the decisions of this Court to the effect that the purpose of that act was to effectuate a public policy rather than to protect private rights.

2. The Circuit Court of Appeals, Eighth Circuit, erred in finding and holding that the order of that Court, entered after the proceedings in the Bankruptcy Court were instituted, created a provable debt in bankruptcy.

3. The Circuit Court of Appeals, Eighth Circuit, erred in finding and holding that because the National Labor Relations Board alone is authorized to enforce the obligations of a public character created by the National Labor Relations Act, the Board's status is that of a plenary trusteeship for the employees as individuals, and that the Board is authorized to take such steps as in its opinion are necessary to protect the private rights of such employees.

4. The Circuit Court of Appeals, Eighth Circuit, erred in finding and holding that the National Labor Relations Board is a "creditor" as defined by the Bankruptcy Act.

5. The Circuit Court of Appeals, Eighth Circuit, erred in finding and holding that the amount of the back pay award was ascertainable, whereas the liability had not been determined at the time of bankruptcy and was not ascertainable. The Court overlooked the decision of this Court in *Zavelo v. Reeves,* 227 U. S. 625, 57 L. Ed. 676, 33 S. Ct.

365, to the effect that a claim, to be provable in bankruptcy, must exist at the time of bankruptcy.

6. The Circuit Court of Appeals, Eighth Circuit, erred in finding and holding that the claim of the National Labor Relations Board is entitled to the priority given wage claims under Section 64 of the Bankruptcy Act, and that the amount of the claim represents "wages earned."

7. The Circuit Court of Appeals, Eighth Circuit, erred in overlooking the decision of this Court in *National Labor Relations Board v. Jones and Laughlin S. Corp.*, 301 U. S. 1, 81 L. Ed. 893, 57 S. Ct. 615, wherein this Court held that it is the duty of the Courts to adopt a construction of the National Labor Relations Act that would avoid unconstitutional procedure. The decision of the Circuit Court of Appeals permits and sanctions an unlawful delegation of legislative power to the National Labor Relations Board in violation of Section 1 of Article I of the Constitution of the United States, and in violation of the Seventh and Tenth Amendments to the Constitution, and such an interpretation of the Act should be avoided.

SUMMARY OF ARGUMENT.

POINT A.

The purposes of the National Labor Relations Act are public purposes. The opinion and decree of the Circuit Court of Appeals to the effect that an important purpose was to protect the economic status of employees, and that the Act creates private rights or authorizes the creation of private rights for the purpose of protecting employees, is contrary to the decisions of this Court.

POINT B.

The opinion and decree of the Circuit Court of Appeals construes the order of that Court, affirming and directing payment of a back pay award, as creating a definite and enforceable obligation against the employer. Since the order of the Court was rendered subsequent to the filing of the petition in these proceedings, the decision here appealed from is contrary to the holdings of this Court.

POINT C.

There is no statutory basis for the finding and conclusion of the Circuit Court of Appeals that the status of the National Labor Relations Board is one of plenary trusteeship for employees.

POINT D.

The opinion and decree of the Circuit Court of Appeals arbitrarily gives to the back pay awards the status of wages earned, for which conclusion there is no statutory basis.

POINT E.

The Courts should adopt a construction of the National Labor Relations Act that would avoid unconstitutional procedure.

ARGUMENT.

POINT A.

The purposes of the National Labor Relations Act are public purposes. The opinion and decree of the Circuit Court of Appeals to the effect that an important purpose was to protect the economic status of employees, and that the Act creates private rights or authorizes the creation of private rights, for the purpose of protecting employees, is contrary to the decisions of this Court.

The philosophy of the Court below as evidenced in the majority opinion, is a unique one. There has been much recent legislation enacted for the purpose of the protection of wage earners, and to create private rights in favor of individual employees; but the Courts have uniformly interpreted the National Labor Relations Act to constitute legislation enacted for public as distinguished from private purposes. The Act itself contains a statement of its purposes. The President in approving it issued a formal statement in which he defines the purposes of the Act as he understood them. This Court has in various cases necessarily stated the purposes of the Act at some length. We do not find either in the proceedings before Congress, or in the decisions, the thought that the right of remedial action conferred by the Act on the National Labor Relations Board was created for the purpose of vindicating private rights. Had Congress intended to protect private interests, it would have been indeed simple for Congress to have stated so either in the preamble to the Act or in the specific provisions thereof, or in both.

The filing and allowance of a claim in bankruptcy is in furtherance of the private rights of a creditor. The Bankruptcy Act defines the term "Creditor," and the right to file a claim in bankruptcy is limited by the Bankruptcy

Act. The allowance of a claim in bankruptcy is the recognition of a private right. The opinion of the Circuit Court of Appeals can conceivably serve no public purpose. In so far as it seeks the restoration of the economic status quo of the employees, it seeks to vindicate private rights and is contrary in that respect to the following decisions of this Court. *National Labor Relations Board v. Jones & Laughlin S. Corp.*, 301 U. S. 1, 81 L. Ed. 893, 57 S. Ct. 615; *Associated Press v. National Labor Relations Board*, 301 U. S. 103, 81 L. Ed. 953, 57 S. Ct. 650; *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 82 L. Ed. 638, 40 S. Ct. 459; *National Licorice Co. v. National Labor Relations Board*, 309 U. S. 350, 84 L. Ed. 799, 60 S. Ct. 569; *Washington, V. & M. C. Co. v. National Labor Relations Board*, 301 U. S. 142, 81 L. Ed. 965, 57 S. Ct. 648; *Republic Steel Corp. v. National Labor Relations Board*, 311 U. S. 7, 61 S. Ct. 77, 85 L. Ed. Adv. Ops., p. 1.

The majority opinion does suggest that a public purpose will be served by permitting the filing of a claim. We refer to the statement that "public policy cannot permit such a valid order of the Board to be thwarted or escaped, if there is any sound way to prevent it." The decision seems to assume that an employer might go into bankruptcy to escape the effect of a back pay award, and that his purpose would be aided by the denial of the right to file a claim based upon that award. But it would appear that the contrary is true. In the first place, the burden of the back pay award in a bankruptcy case will not fall upon the employer, but upon the employer's creditors. In the case at bar, it so happens that in all likelihood that burden will fall upon the holders of tax claims and upon the holders of claims for wages actually earned. The bankrupt, being defunct, is indifferent.

The function of an award of pay back is to effectuate the policies of the National Labor Relations Act in preventing

an obstruction to the free flow of interstate commerce. With bankruptcy all flow of commerce ceased, so far as the bankrupt was concerned, and nothing could be effectuated by the allowance of a claim; the only effect would be to penalize innocent creditors.

A more serious consequence of the allowance of the claim will be the discharge from the claim that is given to provable debts in bankruptcy. See Bankruptcy Act of 1898, as amended, Section 17 (11 U. S. C. A., Section 35).* Thus an employer will under the decision below be enabled, except to a limited extent, to escape a back pay award, whether a claim is filed or not, by filing a petition in bankruptcy. This will tend to thwart rather than to effectuate the public policy of the Act.

POINT B.

The opinion and decree of the Circuit Court of Appeals construes the order of that Court, affirming and directing payment of a back pay award, as creating a definite and enforceable obligation against the employer. Since the order of the Court was rendered subsequent to the filing of the petition in these proceedings, the decision here appealed from is contrary to the holdings of this Court.

The majority opinion below directly holds that the order of the Eighth Circuit Court of Appeals directing payment of the back pay award stamped the back pay award as a definite and enforceable obligation against the Hamilton-Brown Shoe Company. The enforcement order of the Eighth Circuit Court of Appeals was rendered on May 29, 1939. The petition for corporate reorganization had been previously filed, to wit, on April 17, 1939. This Court has held that provable debts in bankruptcy are such only as existed at the time of bankruptcy. *Zavelo v. Reeves*, 227 U. S. 625, 57 L. Ed. 676, 33 S. Ct. 365.

* See Appendix B.

POINT C.

There is no statutory basis for the finding and conclusion of the Circuit Court of Appeals that the status of the National Labor Relations Board is one of plenary trusteeship for employees.

The Circuit Court of Appeals in its decision gave the National Labor Relations Board the status of a plenary trusteeship. This holding seems to be based upon a practice of the Board to receive and distribute back pay awards. There is no statutory basis for such a conclusion. The Board is accordingly included as a creditor within the definition of Section 1 (11), 11 U. S. C. A., Section 1 (11), providing that a " 'Creditor' shall include anyone who holds a debt, demand or claim provable in bankruptcy and may include his duly authorized agent, attorney or proxy." The opinion provides, however, for the allowance of the separate claims of the individual wage earners, the priority to be given to each claimant to depend upon the facts respecting the status of each individual employee. In other words, at one point in the decision the creditor is the Board; at another point the individual employees are regarded as creditors.

The National Labor Relations Act affords no basis for the concept of a plenary trusteeship analogous to the guardianship of the United States over Indian tribes.

POINT D.

The opinion and decree of the Circuit Court of Appeals arbitrarily gives to the back pay awards the status of wages earned, for which conclusion there is no statutory basis.

Respondent contended that its claim should be given the priority due the United States under Section 64a (5) of

the Bankruptcy Act [Title 11, U. S. C. A. 104a (5)]. Petitioner contended that there is no provision either in the National Labor Relations Act or in the Bankruptcy Act for the granting of priority status to a back pay award. On the theory that such an award created a liability for wages constructively earned, the Circuit Court of Appeals decided that the claim of each wage earner should be given the priority provided by the Bankruptcy Act, in Section 64a (2) [Title 11, U. S. C. A. 104a (2)]. It is, we urge, a strained construction of language to designate such an award as "wages earned." If it is to be held that the National Labor Relations Act created a private right, then that right is the nature of a claim for damages and as such is not entitled to priority of payment.

The Chandler Act (Act of June 22, 1931, C. 575, 52 Stat. 840, 11 U. S. C. A., Section 1 et seq.), revising generally the Bankruptcy Act, was enacted in 1938. At that time the propriety of back pay awards had been considered in many cases. Congress, although revising and liberalizing Section 64 of the Bankruptcy Act and even liberalizing the provisions respecting preferred wage claims, made no provision for the allowance of back pay awards as priority claims.* We submit that the Circuit Court of Appeals erred in so doing.

POINT E.

The Courts should adopt a construction of the National Labor Relations Act that would avoid unconstitutional procedure.

The decision of the Eighth Circuit Court of Appeals assumes that petitioner here is challenging the constitutionality of the National Labor Relations Act. But peti-

* For Section 64 after the passage of the Chandler Act, see Appendix D; for section 64 prior to the Chandler Act, see Appendix E.

tioner has not done so. The constitutionality of the Act is beyond question. The decision of this Court in the case of *National Labor Relations Board v. Jones & Laughlin S. Corp.*, 301 U. S. 1, 81 L. Ed. 893, 57 S. Ct. 615, clearly upheld the constitutionality of the Act and went further. The Court pointed out that a construction of the Act which would render it unconstitutional should be avoided. We maintain that the construction placed upon the Act by respondent here, and by the Circuit Court of Appeals in its decision, places a construction upon the Act which would render it unconstitutional, and that therefore the decision is contrary to the *Jones & Laughlin* case.

We say that such a construction permits the National Labor Relations Board, in its discretion, to create a provable claim in bankruptcy and to establish and enforce private rights of employees, where no such liability has been provided by Congress. The fixation of a liability is discretionary, because the Board is not required to make an award of back pay. If the Act were to be so interpreted, then in that event it would have to be declared unconstitutional as permitting an unlawful delegation of legislative authority contrary to Section 1 of Article I of the Constitution, contrary to the decisions of this Court. *Schechter Poultry Corp. v. United States*, 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837. *Carter v. Carter Coal Co.*, 298 U. S. 238, 80 L. Ed. 1160, 56 S. Ct. 855. It is accordingly our contention, not that the Act is unconstitutional, but that, as pointed out in the *Jones & Laughlin* case, any interpretation of the Act which might render it unconstitutional should be avoided; and that the interpretation placed upon the Act by the Circuit Court of Appeals would involve an unconstitutional delegation of legislative authority. The Court has in its opinion failed to follow the *Jones & Laughlin* case.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers. To such end, a writ of certiorari should be granted so that this Court may review the decision of the Eighth Circuit Court of Appeals and finally reverse it.

Respectfully submitted,

LON O. HOCKER,
HARRY S. GLEICK,
Counsel for Petitioner.

APPENDIX.

A.

Section 10 (c) of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449), Title 29, U. S. C. A., Section 160 (c):

"The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint."

B.

Section 17 of the Bankruptcy Act:

"Sec. 17. Debts Not Affected by a Discharge.—(a) A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as (1) are due as a tax levied by the United States, or any State, county, district, or municipality; (2) are liabilities for obtaining money or property by false pretenses or false representations, or for wilful and malicious injuries to the

person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for breach of promise of marriage accompanied by seduction, or for criminal conversation; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity; or (5) are for wages which have been earned within three months before the date of commencement of the proceedings in bankruptcy due to workmen, servants, clerks, or traveling or city salesmen, on salary or commission bases, whole or part time, whether or not selling exclusively for the bankrupt; or (6) are due for moneys of an employee received or retained by his employer to secure the faithful performance by such employee of the terms of a contract of employment."

C.

Section 63a (4) of the Bankruptcy Act:

"Sec. 63. Debts Which May Be Proved.—(a) Debts of the bankrupt may be proved and allowed against his estate which are founded upon * * * (4) an open account, or a contract express or implied * * *."

D.

Section 64 of the Bankruptcy Act, as amended by the Chandler Act (Act of June 22, 1938, c. 575, 52 Stat. 840), 11 U. S. C. A., Section 104:

"Sec. 64. Debts Which Have Priority.—(a) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition; the filing fees paid by creditors in involuntary cases;

where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the cost and expense of one or more creditors, the reasonable costs and expenses of such recovery; the costs and expenses of administration, including the trustee's expenses in opposing the bankrupt's discharge, the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases and to the bankrupt in voluntary and involuntary cases, as the court may allow; (2) wages, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; (3) where the confirmation of an arrangement or wage-earner plan or the bankrupt's discharge has been refused, revoked, or set aside upon the objection and through the efforts and at the cost and expense of one or more creditors, or, where through the efforts and at the cost and expense of one or more creditors, evidence shall have been adduced resulting in the conviction of any person of an offense under this Act, the reasonable costs and expenses of such creditors in obtaining such refusal, revocation, or setting aside, or in adducing such evidence; (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof: *Provided*, That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court: *And provided further*, That, in case any question arises as to the amount or legality of any taxes, such question shall

be heard and determined by the court; and (5) debts owing to any person, including the United States, who by the laws of the United States is entitled to priority, and rent owing to a landlord who is entitled to priority by applicable State law: *Provided, however,* That such priority for rent to a landlord shall be restricted to the rent which is legally due and owing for the actual use and occupancy of the premises affected, and which accrued within three months before the date of bankruptcy.

"(b) Debts contracted while a discharge is in force or after the confirmation of an arrangement shall, in the event of a revocation of the discharge or setting aside of the confirmation, have priority and be paid in full in advance of the payment of the debts which were provable in the bankruptcy or arrangement proceeding, as the case may be."

E.

Section 64 of the Bankruptcy Act, prior to the enactment of the Chandler Act:

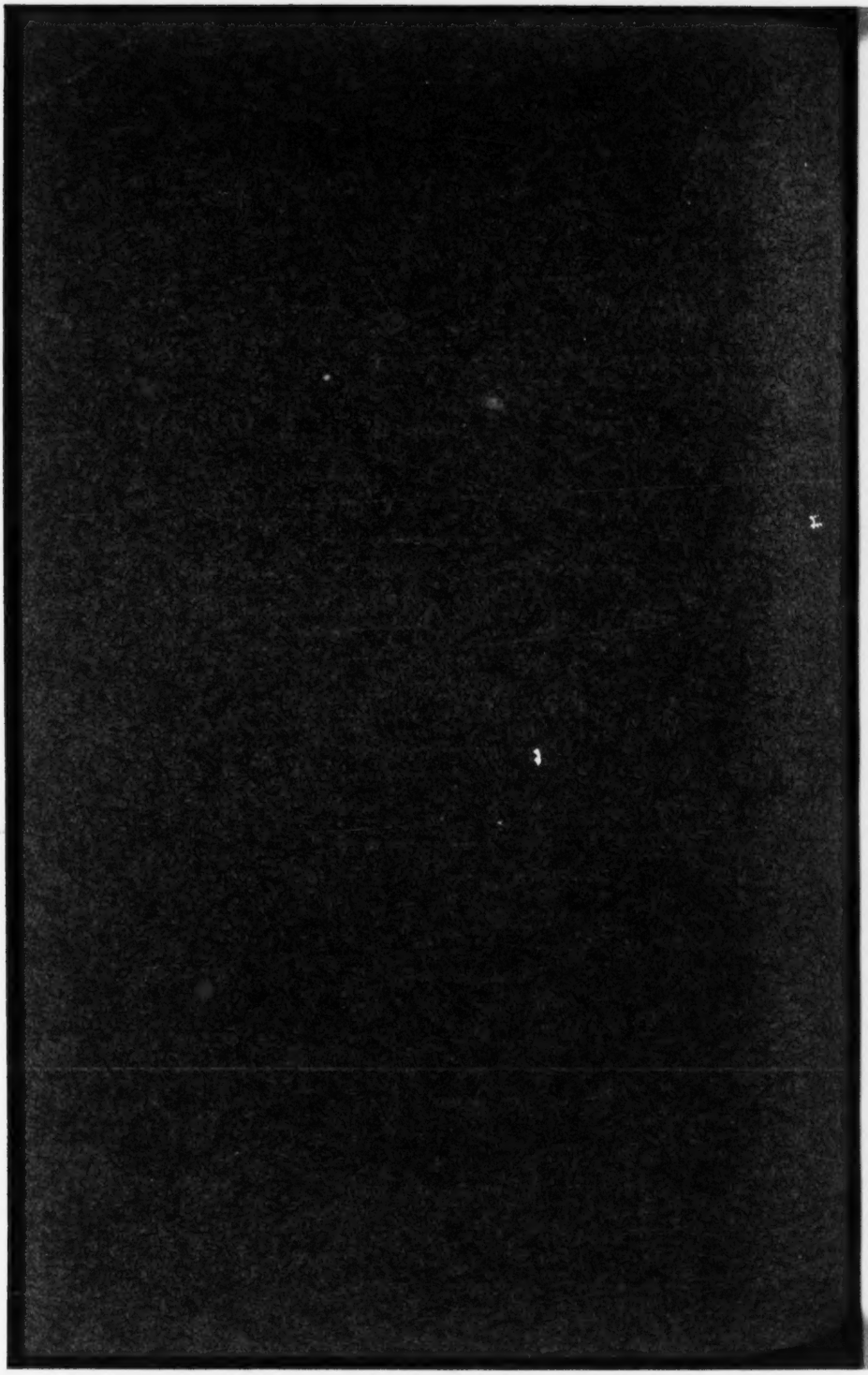
"Sec. 64. Debts Which Have Priority—a. The Court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality, in the order of priority as set forth in paragraph (b) hereof: Provided, That no order shall be made for the payment of a tax assessed against real estate of a bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court. Upon filing the receipts of the proper public officers for such payments the trustee shall be credited with the amounts thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.

"b. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition,

(2) the filing fees paid by creditors in involuntary cases, and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expense of such recovery, (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary and involuntary cases as the court may allow; (4) where the confirmation of composition terms has been refused or set aside upon the objection and through the efforts and at the expense of one or more creditors, in the discretion of the court, the reasonable expenses of such creditors in opposing such composition, (5) wages due to workmen, clerks, traveling or city salesmen, or servants, which have been earned within three months before the date of the commencement of the proceeding, not to exceed $600 to each claimant, (6) taxes payable under paragraph (a) hereof and (7) debts owing to any person who by the laws of the States or the United States is entitled to priority: Provided, That the term 'person' as used in this section shall include corporations, the United States and the several States and Territories of the United States.

"c. In the event of the confirmation of a composition being set aside, or a discharge revoked, the property acquired by the bankrupt in addition to his estate at the time the composition was confirmed or the adjudication was made shall be applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such composition or discharge was in force, and the residue, if any, shall be applied to the payment of the debts which were owing at the time of the adjudication."

No. 739



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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 739

WILLIAM H. KILLOREN, TRUSTEE IN BANKRUPTCY OF HAMILTON-BROWN SHOE COMPANY, A CORPORATION, BANKRUPT, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the referee in bankruptcy (R. 105–117) is not officially reported. The decision of the District Court (R. 129–130) was rendered without opinion. The opinion of the Circuit Court of Appeals (R. 161–171) is reported in 122 F. (2d) 609.

JURISDICTION

The judgment of the court below was entered on September 6, 1941 (R. 172). Petitions for rehear-

ing filed by petitioner and the Board, respectively, were denied on October 11, 1941 (R. 203). The petition for a writ of certiorari was filed on November 12, 1941. The jurisdiction of the Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board may file proof in bankruptcy of a claim for sums due under a back pay order issued by the Board and enforced by a circuit court of appeals under the National Labor Relations Act.[1]

2. Whether the claim, if thus provable, is entitled to a priority under Section 64 (a) (2) of the Bankruptcy Act.[2]

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act and of the Bankruptcy Act are set out in the appendix.

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[1] We discuss *infra* (p. 6, n. 5), the petitioner's failure to mention the entry of the enforcement decree in its statement of the questions presented.

[2] Petitioner includes among its questions presented the question whether the claim, if provable, is entitled to a priority under Section 64 (a) (2) or a governmental priority under Section 64 (a) (5) (Pet. 4). The Board urged entitlement to priority under the latter section (R. 6) but the court below held that only a wage priority was permissible. In these circumstances, petitioner cannot properly raise the question whether a Section 64 (a) (5) priority is proper.

STATEMENT

In a proceeding under Section 10 of the National Labor Relations Act involving alleged unfair labor practices committed by Hamilton-Brown Shoe Company, the Board, on November 23, 1938, issued its findings of fact, conclusions of law, and order (R. 19–33). The Board found that the Company had engaged in certain unfair labor practices; its order, among other provisions, directed the Company to reinstate or place upon a preferential list certain employees found to have been discriminatorily discharged, and to make whole their losses by paying to each of them a sum equal to what each, but for the discrimination, would normally have earned from the date of discharge to the date of reinstatement or placement upon a preferential list, less actual earnings elsewhere (R. 29–33). On petition for review under Section 10 (f) of the Act, the court below entered its decree on May 29, 1939, enforcing the reinstatement and back pay provisions (R. 47–49).

On April 17, 1939, while the petition for review was pending in the lower court, the Company filed in the District Court a petition for corporate reorganization pursuant to Chapter X of the Bankruptcy Act (R. 107). On June 22, 1939, after the entry of the enforcement decree, the Company was adjudicated a bankrupt (R. 107). On October 9, 1939, the Board filed in the District Court a proof of claim for back pay due accumulated under the

Board's order, aggregating $161,160.17 (R. 4–53). The Board alleged that the claim for back pay was provable as a debt owing to the Board (R. 5), and that the claim was entitled to priority under Section 64 (a) (5) of the Bankruptcy Act as a debt owing to the United States (R. 6). On motion of petitioner (R. 55–59), the referee in bankruptcy rendered a memorandum opinion (R. 105–117) and entered an order (R. 119) expunging the Board's claim. Upon the Board's petition to review (R. 120–126), the District Court affirmed the referee's order (R. 129–131).

On appeal by the Board, the court below handed down its opinion, with one judge dissenting (R. 161–171), and entered its judgment (R. 172) reversing the order of the District Court and remanding the cause for proceedings in accordance with its opinion. In substance, the court below held that the obligation of back pay was a provable debt; that the Board had authority to file a claim in respect thereof; and that the claim was entitled to a "wage" priority under Section 64 (a) (2) of the Bankruptcy Act. The Board filed a petition for rehearing limited to the priority question (R. 173–181); petitioner sought a rehearing of the entire case (R. 183–201). Both petitions were denied (R. 203).

ARGUMENT

Petitioner contends that the instant case raises important federal questions not settled by this Court and that the decision below is in probable

conflict with applicable decisions of this Court (Pet. 4, 12).

1. The questions here presented are of first impression. They are not, however, of current importance in the administration of the National Labor Relations Act or the Bankruptcy Act. In no other case has the Board filed, and rarely has it had occasion even to consider filing, a claim in bankruptcy in respect of a back pay order. *A fortiori,* there has been no similar litigation and there are no other relevant decisions of the circuit courts of appeals. Whether the questions raised will in the future recur so as to become important in the administration of the National Labor Relations Act or the Bankruptcy Act is a matter only for speculation.

2. The argument in support of the claim that the decision below is in probable conflict with the applicable decisions of this Court construing the National Labor Relations Act (Pet. 10, 11–12, 14, 15) is that the Act protects only public rights, whereas the rights given effect by the decision below are private since back pay is ultimately distributable to employees. But in holding that back pay is "an obligation or indebtedness of a public character," the court below expressly gave effect to the decisions of this Court that orders of the Board vindicate public, not private, rights (R. 168, 164–165).[3] The

[3] There is no merit in petitioner's argument (Pet. 14–15) that the wage priority accorded the back-pay obligation is inconsistent with the public character of that obligation. Making the employees whole for "losses suffered on account

claim of conflict is thus based on a misconstruction of the decision of the court below, which, in fact, properly applied the very decisions of this Court upon which petitioner relies.[4]

3. We submit that the decision below, in the respects open to attack by petitioner,[5] is correct. It

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of unfair labor practices is a part of the vindication of the public policy which the Act enforces." *Phelps Dodge Corporation* v. *National Labor Relations Board*, 313 U. S. 177, 197; R. 163. For comparable reasons, a jury trial is not necessary. *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1, 48.

[4] Petitioner's further claim (Pet. 15–16) that the decision below casts doubt upon the constitutionality of the National Labor Relations Act is predicated upon the assertion that the decision operates to amend the Bankruptcy Act and the National Labor Relations Act. This assertion begs all questions presented.

[5] Petitioner does not state as a question presented its argument (Pet. 13) that, assuming that back pay becomes provable when a Board order is enforced, the obligation does not in any event arise until the enforcement decree is entered, and hence the claim was not in existence in this case when the bankruptcy petition was filed. Petitioner made no such assertion in its motion to expunge (R. 55–59, see R. 59–105) in the District Court, nor did it do so in the court below, as is evident from the court's opening statement of the questions and its repeated reference thereafter to the entry of the enforcement decree (R. 161, 163, 164).

Were the question presented, it would be a sufficient answer that the back pay liability springs essentially from the order of the Board under the Act, and that a liability having such a statutory source is provable under Section 63 (a) (4) of the Bankruptcy Act, as the court below noted (R. 164). The effect of an enforcement decree is, therefore, to determine issues of validity, as does a judgment rendered after filing of a bankruptcy petition upon a debt otherwise provable, as provided for in Section 63 (a) (5).

seems clear that a back pay obligation enforced by court decree is analogous to, and no less definite or ascertainable than, the variety of liabilities provable in bankruptcy.[6] That the Board has standing to file proof of claim therefor, follows as an incident of its exclusive power to sue for compliance with its orders under the enforcement framework of the National Labor Relations Act. And the purpose of a back pay award to put the employee in the wage position he would have occupied but for the unfair labor practices supports the propriety of the wage priority at least.

CONCLUSION

The decision below is correct. It raises no questions of general current importance and there is no conflict. It is respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.

ROBERT B. WATTS,
General Counsel,

LAURENCE A. KNAPP,
Associate General Counsel,

A. NORMAN SOMERS,
Attorney,
National Labor Relations Board.

DECEMBER 1941.

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[6] Petitioner's contrary position appears to be based upon its assertion (Pet. 11–12) that only claims grounded on "the private rights of a creditor" may be proved under the Bankruptcy Act. The various governmental liabilities provable, such as the tax claims proved in this case (Pet. 12), leaves petitioner's assertion meritless.

APPENDIX

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 372, 49 Stat. 449, 29 U. S. C. Supp. V, Section 151 et seq.) are as follows:

SECTION 10. * * *

* * * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of

the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

The pertinent portions of the Bankruptcy Act (Act of July 1, 1898, as amended; 11 U. S. C., Supp. V, Secs. 1, 93, 103, and 104) are as follows:

SECTION 1. *Meaning of words and phrases.*—The words and phrases used in this title and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows:

* * * * *

(11) "Creditor" shall include anyone who owns a debt, demand, or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy;

* * * * *

(14) "Debt" shall include any debt, demand, or claim provable in bankruptcy;

* * * * *

SECTION 57. *Proof and allowance of claims.*—a. A proof of claim shall consist of a statement under oath, in writing and signed by a creditor, setting forth the claim; the consideration therefor; whether any and, if so, what securities are held therefor; and whether any and, if so, what payments have been made thereon; and that the claim is justly owing from the bankrupt to the creditor.

* * * * *

SECTION 63. *Debts which may be proved.*—a. Debts of the bankrupt may be proved and allowed against his estate which are founded upon (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the

filing of the petition by or against him, whether then payable or not, * * * (4) an open account, or a contract express or implied; (5) provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, * * *.

* * * * *

SECTION 64. *Debts which have priority.*— a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be * * * (2) wages, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, * * * (5) debts owing to any person, including the United States, who by the laws of the United States is entitled to priority, * * *.

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